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Public Prosecutor v Alfitrisham bin Ahmad and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05–200 OF 2010 AND P-05–215 OF 2010
BALIA YUSOF, TENGKU MAIMUN AND ZAKARIA SAM JJCA
24 JUNE 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused persons charged for trafficking in dangerous drugs — First accused convicted and sentenced to death while second accused acquitted and discharged — Appeal against conviction and sentence by first accused — Whether prima facie case successfully proven — Whether there was mens rea of possession and presumed trafficking — Whether conviction and sentence safe — Dangerous Drugs Act 1952 s 39B(2)

The first and second accused persons were charged for trafficking in 4,619g of cannabis, an offence under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). A police team laid surveillance at the suspected venue where a man ('Alshukri') was seen walking from Jalan Zoo and stood waiting in front of house No 31. A motorcycle entered Jalan Zoo and the rider was wearing a helmet ('the first accused') while the pillion ('the second accused') was not. When the motorcycle made a U-turn near Alshukri, the police ambushed the three men. Alshukri ran to house No 36U which belonged to his and the second accused's grandmother's house. The second accused and Alshukri were brothers. From the carrier basket of the motorcycle, the police recovered one green plastic bag ('exh P25') which contained one black plastic bag ('exh P26'). From P26, five slabs of compressed dried leaves wrapped in transparent packages suspected to contain drugs were found. The slabs were later confirmed to be 4,619g of cannabis. The prosecution submitted that both the first and second accused persons were in possession of the drugs and given the quantity of the cannabis, they were presumed to be trafficking under s 37(da) of the Act. At the end of the prosecution case, the trial judge found that the prosecution failed to prove a prima facie case against the second accused and proceeded to acquit and discharge him. However, the trial judge found that the prosecution had proved a prima facie case of mens rea possession and presumed trafficking under s 37(da) against the first accused. In his defence, the first accused stated that the bag found in the carrier basket was placed there by the second accused and that the first accused had informed this to the police when he was arrested and when he was interrogated by the investigating officer. Having found that the defence failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on the balance of probabilities, the trial judge consequently convicted and sentenced

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the first accused to death. Aggrieved by the order of acquittal and discharge of the second accused, the prosecution filed an appeal while the first accused filed an appeal against his conviction and sentence. The issues that arose were whether s 34 of the Penal Code applied and whether the trial judge had misdirected himself in considering the cautioned statement and in acquitting and discharging the second accused.

Held, dismissing the appeal of first accused and affirming the conviction and sentence of High Court:

(1) Common intention within the meaning of s 34 of the Penal Code implied a pre-arranged plan. The prosecution relied on the fact that the second accused was a pillion rider on the motorcycle from where the drugs were found. Apart from the fact that the second accused was a pillion rider, there were no other facts or circumstances or conduct of the second accused from which an pre-arranged plan or common intention could be inferred between the first and second accused persons. Mere presence as the pillion was not sufficient to attach the liability of the second accused under s 34 of the Penal Code. Hence, there was no error on the part of the trial judge when His Lordship found that the prosecution failed to prove the element of common intention (see para 13).

(2) The cautioned statement was not the basis for the order of acquittal and discharge of the second accused. The trial judge had merely considered the cautioned statement together with the evidence of the prosecution witnesses in coming to the conclusion that the prosecution had failed to prove a prima facie case against the second accused. In fact, although the second accused had stated in his cautioned statement that he was not a pillion rider on the said motorcycle, the trial judge did find that the second accused was pillion riding (see para 16).

(3) The trial judge did not err in finding that the prosecution had not proved possession against the second accused and in the circumstances, the court agreed with the trial judge that the presumption of trafficking under s 37(da) would not arise or could not be invoked. The facts and circumstances of this case did not justify the invocation of s 2 of the Act to find trafficking against the second accused (see para 17).

(4) There were no merits in the grounds canvassed by the first accused. There was no misdirection by the trial judge in finding that the prosecution had proved a prima facie case against the first accused. The trial judge had considered the elements of custody and control and knowledge of the drugs in finding that the first accused had mens rea possession of the drugs (see para 22).

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[Bahasa Malaysia summary

Tertuduh pertama dan kedua telah dituduh mengedar dadah kanabis seberat 4,619g, satu kesalahan di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pasukan polis telah membuat pemantauan di tempat yang disyaki di hadapan rumah No 31. Sebuah motorsikal telah memasuki Jalan Zoo dan penunggang itu memakai topi keledar ('tertuduh pertama') manakala pembonceng ('tertuduh kedua') tidak. Apabila motorsikal itu membuat pusingan-U dekat Alshukri, polis telah menyerang hendap ketiga-tiga lelaki itu. Alshukri lari ke rumah No 36U miliknya dan nenek tertuduh kedua. Tertuduh kedua dan Alshukri adalah adik-beradik lelaki. Daripada bakul pembawa motorsikal itu, polis menjumpai satu beg plastik hijau ('eksh P25') yang mengandungi satu beg plastik hitam ('eksh 26'). Daripada P26, lima papak daun kering mampat yang dibalut dalam bungkusan telus disyaki mengandungi dadah telah ditemui. Papak-papak itu kemudian disahkan sebagai kanabis seberat 4,619g. Pendakwaan berhujah bahawa kedua-dua tertuduh pertama dan kedua memiliki dadah itu dan berdasarkan kuantiti kanabis itu, mereka dianggap telah mengedar dadah di bawah s 37(da) Akta tersebut. Di akhir kes pendakwaan, hakim perbicaraan mendapati bahawa pendakwaan telah gagal untuk membuktikan kes prima facie terhadap tertuduh kedua dan seterusnya membebas dan melepaskannya. Walau bagaimanapun, hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan kes prima facie milikan secara mens rea dan membuat andaian pengedaran di bawah s 37(da) Akta tersebut terhadap tertuduh pertama. Dalam pembelaannya, tertuduh pertama menyatakan bahawa beg itu ditemui dalam bakul pembawa yang diletakkan oleh tertuduh kedua dan bahawa tertuduh pertama telah memberitahu tentang perkara ini kepada polis apabila dia ditangkap dan apabila dia disoal siasat oleh pegawai penyiasat. Setelah mendapati pembelaan gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan gagal mematahkan andaian pengedaran atas imbangan kebarangkalian, hakim perbicaraan seterusnya mensabit dan menjatuhkan hukuman mati ke atas tertuduh pertama. Terkilan dengan perintah-perintah pembebasan dan pelepasan tertuduh kedua, pendakwaan telah memfailkan rayuan manakala tertuduh pertama telah memfailkan rayuan terhadap sabitan dan hukumannya. Isu-isu yang timbul adalah sama ada s 34 Kanun Keseksaan terpakai dan sama ada hakim perbicaraan telah salah arah dalam mempertimbangkan pernyataan beramaran dan membebas dan melepaskan tertuduh kedua.

Diputuskan, menolak rayuan tertuduh pertama dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Niat bersama dalam maksud s 34 Kanun Keseksaan menyiratkan rancangan yang telah diatur sebelumnya. Pendakwaan bergantung kepada fakta bahawa tertuduh kedua adalah pembonceng motorsikal di mana dadah itu ditemui. Selain daripada fakta bahawa tertuduh kedua

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adalah pembonceng, tiada fakta atau keadaan atau perlakuan yang lain tertuduh kedua yang mana rancangan yang telah diatur sebelumnya atau niat bersama boleh disimpulkan antara tertuduh pertama dan kedua. Kehadiran semata-mata sebagai pembonceng tidak mencukupi untuk meletakkan liabiliti tertuduh kedua di bawah s 34 Kanun Keseksaan. Justeru, tiada kekhilafan di pihak hakim perbicaraan apabila dia mendapati pendakwaan telah gagal untuk membuktikan elemen niat bersama (lihat perenggan 13).

(2) Pernyataan beramaran bukan asas untuk perintah pembebasan dan pelepasan tertuduh kedua. Hakim perbicaraan hanya mempertimbangkan pernyataan beramaran bersama keterangan saksi-saksi pendakwaan untuk mendapat kesimpulan bahawa pendakwaan telah gagal untuk membuktikan kes prima facie terhadap tertuduh kedua. Bahkan, meskipun tertuduh kedua telah menyatakan dalam pernyataan beramarannya bahawa dia bukan pembonceng motorsikal tersebut, hakim perbicaraan masih mendapati bahawa tertuduh kedua sedang menunggang motorsikal (lihat perenggan 16).

(3) Hakim perbicaraan tidak terkhilaf dalam mendapati bahawa pendakwaan tidak membuktikan milikan terhadap tertuduh kedua dan dalam keadaan itu, mahkamah bersetuju dengan hakim perbicaraan bahawa andaian pengedaran di bawah s 37(da) tidak mungkin timbul atau boleh digunakan. Fakta dan keadaan kes ini tidak mewajarkan penggunaan s 2 Akta tersebut untuk mendapati pengedaran terhadap tertuduh kedua (lihat perenggan 17).

(4) Tiada merit dalam alasan-alasan yang diteliti oleh tertuduh pertama. Tiada salah arah oleh hakim perbicaraan dalam mendapati pendakwaan telah membuktikan kes prima facie terhadap tertuduh pertama. Hakim perbicaraan telah mempertimbangkan elemen-elemen jagaan dan kawalan dan pengetahuan dadah dalam mendapati bahawa tertuduh pertama mempunyai milikan mens rea dadah itu (lihat perenggan 22).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Mahbub Shah v Emperor AIR 1945 PC 118, PC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (not folld)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)

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Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), (da)(iv)
Penal Code s 34

Appeal from: Criminal Trial No 45–20 of 2008 (High Court, Pulau Pinang)

Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No P-05–200 of 2010 for the appellant.
Muhammad Shafee Abdullah (Norsyamimi bt Bukhari with him) (Shafee & Co) in Criminal Appeal No P-05–215 of 2010 for the appellant.
RSN Rayer (R Nethaji Rayer & Co) in Criminal Appeal No P-05–200 of 2010 for the respondent.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No P-05–215 of 2010 for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] Helmi bin Jamaludin ('the first accused') and Alfitrisham bin Ahmad ('the second accused') were charged for trafficking in dangerous drugs, to wit, 4,619g of cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code.

[2] The prosecution's case may be briefly summarised as follows. On 12 July 2007 at about 9.30pm, a police team comprising of 17 personnel involving three cars and two motorcycles laid surveillance at Jalan Zoo, Air Itam, Pulau Pinang. The team was led by SP5. At about 9.35pm, a man was seen walking from Jalan Zoo and stood waiting in front of house No 31. At about 9.45pm, a Yamaha motorcycle entered Jalan Zoo from Jalan Air Itam. The rider was wearing a helmet while the pillion was not. The motorcycle made a U-turn near the man who was standing in front of house No 31 and stopped next to the man.

[3] The police ambushed the three men. SP5 managed to handcuff and arrest the rider (later identified as the first accused). The pillion (the second accused) and the man seen earlier standing in front of house No 31 (identified as Alshukri) ran to house No 36U. The second accused and Alshukri are brothers. House No 36U belonged to their grandmother. Both the second accused and Alshukri were arrested by SP7 and C/Insp Ahmad Dahuri respectively at house No 36U.

[4] From the carrier basket of the motorcycle, the police recovered one green plastic bag (exh P25). Inside the green bag, there was one black plastic bag (exh

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P26). From P26, the police found five slabs of compressed dried leaves wrapped in transparent packages (exhs P32, 33, 34, 35 and 36) suspected to contain drugs. Upon analysis by the chemist, the slabs were confirmed to be 4,619g of cannabis.

[5] It was the case for the prosecution that both the first accused and the second accused were in possession of the drugs and given the quantity of the cannabis, they were presumed to be trafficking under s 37(da) of the Act.

[6] At the end of the prosecution's case, having considered in particular the evidence of SP5 and SP7, the learned trial judge found that the prosecution has failed to prove a prima facie case against the second accused. The second accused was acquitted and discharged. The basis for the said acquittal and discharge can be seen from the following paragraphs of the grounds of judgment of the learned trial judge:

> [40] ... Tiada keterangan oleh pihak pendakwaan yang dapat menunjukkan terdapatnya perhubungan atau perancangan di antara tertuduh kedua dan tertuduh pertama. Tiada keterangan oleh pihak pendakwaan yang dapat melihatkan perlakuan overt act oleh tertuduh kedua yang ada kaitan dengan pengendalian dan pengetahuan ke atas dadah terlibat kecuali perlakuan melarikan diri bersama Alshukri ketika serbuan mula berlaku tetapi ketika itu pihak polis belum lagi mengenalkan diri. Oleh itu satu-satunya keterangan yang memudaratkan tertuduh kedua ialah beliau berada di atas motorsikal PHA 7105 sebagai pembonceng. Mahkamah berpendapat hanya membonceng motorsikal tersebut pada jarak dari simpang masuk hingga tempat motorsikal tersebut berhenti yang mana jarak simpang itu adalah berdekatan tidak bermakna tertuduh juga mempunyai milikan ke atas apa yang terdapat dalam raga motorsikal yang diboncengnya itu. ...
>
> [41] Fakta juga menunjukkan lima ketulan dadah terlibat yang terdapat dalam beg plastik hitam yang terdapat dalam beg plastik berwarna hijau muda (P25) tidak boleh dilihat dari luar. Seseorang perlu membuka beg plastik hijau muda dahulu dan kemudian beg plastik berwarna hitam (P26) sebelum ketulan dadah terlibat dapat dilihat. P25 berada di dalam raga di hadapan tertuduh pertama. Motorsikal PHA 7105 tidak dilihat beredar ke arah lain kecuali membuat pusingan U dan berhenti di tempat bertanda 'Y1'. Dengan keterangan yang ada dan ketiadaan keterangan yang menunjukkan terdapatnya niat bersama di antara tertuduh pertama dan tertuduh kedua maka adalah sukar untuk mahkamah ini dengan yakin untuk dapat mengatakan tertuduh kedua mempunyai milikan dan pengetahuan ke atas dadah tersebut. Jika diandaikan tertuduh kedua ada pengetahuan tentang dadah di dalam beg tersebut ianya masih tidak mencukupi kerana pengetahuan sahaja tidak memadai tanpa pemilikan ke atasnya yang melibatkan elemen kawalan dan jagaan yang mana mahkamah ini mendapati tertuduh kedua tidak mempunyai kawalan dan jagaan baik secara individu atau bersesama tertuduh pertama ke atas dadah tersebut. Tidak ada keterangan langsung (direct) atau keterangan mengikut keadaan (circumstantial evidence) yang dapat mengatakan atau dibuat satu kesimpulan yang kukuh bahawa tertuduh kedua mempunyai pemilikan dadah tersebut dengan tertuduh pertama secara niat bersama. Dari mula motorsikal itu

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dilihat masuk ke Jalan Zoo dari arah Jalan Air Itam, beg plastik hijau muda tersebut berada di dalam raga di tengah kedua-dua paha tertuduh pertama yang menunggang motorsikal tersebut. Tertuduh kedua juga tidak ada dilihat menyentuh beg plastik P25 tersebut setelah motorsikal itu berhenti.

[42] Pengemukaan percakapan beramaran tertuduh kedua yang telah ditandakan sebagai eksibit pembelaan D39 tidak boleh diketepikan begitu sahaja oleh mahkamah ini. lanya layak diterima masuk untuk melihatkan jalur pembelaan tertuduh yang boleh diketengahkan pada peringkat kes pendakwaan lagi ... Oleh yang demikian D39 perlu dipertimbangkan bersekali dengan kes pendakwaan di bawah prinsip pertimbangan maksima seperti diperlukan oleh undang-undang. Percakapan beramaran tertuduh melihatkan tertuduh tidak ada membonceng motorsikal PHA 7105 tetapi sebaliknya beliau berada di hadapan masjid setelah turun daripada sebuah kereta jenis Toyota Altis. Selepas itu baharulah tertuduh pertama yang menaiki motorsikal Yamaha datang ke tempat tersebut dan seketika kemudian serbuan berlaku. Percakapan beramaran tertuduh tersebut diberikan pada 13.7.2009 jam 1.20 tengahari iaitu jarak masa tidak sampai 16 jam selepas tertuduh ditangkap pada 12.7.07 jam 9.45 malam. ... adalah juga sukar untuk dikatakan tertuduh kedua yang masih muda untuk dapat mereka-reka cerita yang mempunyai sekuen atau urutan peristiwa sedemikian dalam tempoh yang singkat tersebut. Oleh yang demikian mahkamah memberi nilai berat ke atas percakapan beramaran tertuduh kedua sebagai munasabah dan logik untuk diterima dengan sekuen yang digambarkan di dalamnya sebagai pernyataan pembelaan yang berkemungkinan benar dan telah dapat menimbulkan keraguan bagi kes terhadap beliau. Motorsikal PHA 7105 juga bukan kepunyaan tertuduh kedua.

[43] Kesimpulannya mahkamah mendapati pihak pendakwaan telah gagal membuktikan tertuduh kedua mempunyai milikan dan pengetahuan ke atas dadah yang terdapat di dalam raga motorsikal PHA 7105 tersebut. Dengan yang demikian tidak berbangkit pemakaian peruntukan anggapan di bawah seksyen 37(da) Akta Dadah Berbahaya 1952 ke atas tertuduh kedua. lanya telah tersangkal (rebutted) di peringkat kes pendakwaan sendiri. Mahkamah juga mendapati perlakuan pengedaran bagi tujuan pemakaian seksyen 2 Akta Dadah Berbahaya 1952 tidak boleh digunakan terhadap tertuduh kedua setakat keterangan yang ada tersebut.

[7] As against the first accused, the learned trial judge however found that the prosecution has proved a prima facie case of mens rea possession and presumed trafficking under s 37(da). The first accused was thus called upon to enter his defence on an amended charge (with the exclusion of the second accused).

[8] In his evidence given under oath, the first accused essentially stated that the bag found in the carrier basket of his motorcycle was placed there by the second accused and that he (the first accused) had informed this to the police when he was arrested and when he was interrogated by the investigating officer.

[9] The learned trial judge found the defence to be an afterthought:

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> [71] Pembelaan tertuduh mengatakan beliau pergi ke rumah Alfitrisham dan Alfitrisham telah meletakkan beg plastik hijau (P25) yang mengandungi dadah tersebut ke dalam raga motorsikal tertuduh. Mahkamah dapati pembelaan tertuduh ini tidak pernah dibangkitkan semasa kes pendakwaan. ... Ini adalah perkara yang melibatkan isu material dan cabaran perlu dibuat awal (*Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29). Tertuduh jika benar dengan hasratnya membela diri akan dengan tegas dan jujur mencadangkan beg itu sebenarnya diletakkan oleh Alfitri tetapi menangguhkan pembelaan beliau itu sehingga pembelaan diri dipanggil. Pembelaan sedemikian yang hanya ditimbulkan di peringkat kes pembelaan diri boleh memudaratkan tertuduh kerana prinsip undang-undang adalah trite yang memerlukan pembelaan mengemukakan jalur pembelaan tertuduh ketika kes pendakwaan lagi. ...

[10] Having found that the defence has failed to raise a reasonable doubt on the prosecution's case and has failed to rebut the presumption of trafficking on the balance of probabilities, the learned trial judge consequently convicted and sentenced the first accused to death.

[11] Aggrieved by the order of acquittal and discharge of the second accused, the prosecution filed an appeal No P-05–200 of 2010. The first accused had similarly filed an appeal against the conviction and sentence vide Appeal No P-05–215 of 2010. We heard both appeals together, at the end of which we dismissed both appeals and we affirmed the order made by the High Court. We now give our reasons for the said decision.

THE APPEAL

[12] In respect of the appeal by the prosecution, there was only one issue raised ie that s 34 of the Penal Code applies and that the learned trial judge had misdirected himself in considering the cautioned statement and in acquitting and discharging the second accused at the end of the prosecution's case.

[13] Common intention within the meaning of s 34 implies a prearranged plan. The prosecution relied on the fact that the second accused was a pillion rider on the motorcycle from where the drugs were found. Apart from the fact that the second accused was a pillion rider, there were no other facts or circumstances or conduct of the second accused from which an prearranged plan or common intention could be inferred between the first accused and the second accused (see *Mahbub Shah v Emperor* AIR 1945 PC 118; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401). Mere presence as the pillion in our view is not sufficient to attach the liability of the second accused under s 34 of the Penal Code. Hence, we find no error on the part of the learned trial judge when His Lordship found that the prosecution has failed to prove the element of common intention.

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[14] As for the cautioned statement, learned deputy had relied on the case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233. In *Mansor Md Rashid*, there was credible evidence from the agent provocateur (SP9) that the respondents acted in concert in the sale of the drugs to him. The negotiation to buy drugs on the first occasion was spearheaded by the second respondent who told SP9 that his partner had *ganja*. SP9 was later introduced to the first respondent. On the day and at the place stated in the charge, after SP9 agreed to the quantity and the price, the first respondent directed the second respondent in Kedah dialect 'Deris, pi siapkan barang'. The second respondent then went to room 'K' of the house and came out with the drugs. The first respondent's cautioned statement revealed that one Amran occupied room 'K'.

[15] The learned trial judge concluded that Amran had access or occupation of the premises and the two respondents could not be said to have exclusive custody and control of the drugs found in the room 'K'. The respondents were therefore acquitted and discharged. The prosecution appealed to the Federal Court. Among the issues raised was that the learned trial judge erred in law and in fact in ruling that there must be 'exclusive use of the room K' to prove the charge of trafficking. In setting aside the orders of discharge and acquittal, the Federal Court held that:

> In relation to the use of the exculpatory statement of the 1st respondent (D25), we note that the learned trial judge had used the statement to conclude that Amran occupied room 'K' in the house. Learned Counsel for the 1st respondent had also submitted before us that the 1st respondent's statement D25 showed that he (the 1st respondent) did not negotiate nor did he ask the 2nd respondent to buy the cannabis. With respect, we are of the view that the approach is wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And, in considering whether there is a case to answer, the trial judge ought not take into account such a statement as the basis for founding an order of acquittal and discharge.

[16] In the instant case, having perused the grounds of judgment, we find that the cautioned statement (D39) was not the basis for the order of acquittal and discharge of the second accused. The learned trial judge had merely considered the cautioned statement together with the evidence of the prosecution witnesses in coming to the conclusion that the prosecution had failed to prove a prima facie case against the second accused. In fact, although the second accused had stated in his cautioned statement that he was not a pillion rider on the said motorcycle, the learned trial judge did find that the second accused was pillion riding when His Lordship found that 'hanya membonceng motorsikal tersebut dari simpang masuk hingga tempat motorsikal tersebut berhenti yang mana jarak simpang itu adalah berdekatan

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tidak bermakna tertuduh juga mempunyai milikan ke atas apa yang terdapat dalam raga motorsikal yang diboncengnya itu'.

[17] Further, while the case of *Mansor Md Rashid* involved an agent provocateur and the prosecution's case was premised on the negotiated sale, in the instant case the prosecution was relying on mens rea possession and presumed trafficking under s 37(da) of the Act. We are of the view that *Mansor Md Rashid* is not applicable to the instant case. In our view, the learned trial judge has not erred in finding that the prosecution has not proved possession against the second accused and in the circumstances, we agree with the learned trial judge that the presumption of trafficking under s 37(da) does not arise or could not be invoked. We further agree with the learned trial judge that the facts and circumstances of this case do not justify the invocation of s 2 of the Act to find trafficking against the second accused.

[18] Insofar as the first accused is concerned, the submission of learned counsel centred on the issue of possession and that the learned trial judge has erred and has misdirected himself in law in finding that the prosecution has proved a prima facie case against the first accused and in failing to undertake a separate exercise on whether the first accused has rebutted the presumption of trafficking under s 37(da) of the Act.

[19] It was submitted that the first accused had no knowledge of the drugs and that there was misdirection in law by the learned trial judge when His Lordship took into consideration irrelevant fact ie ownership of the motorcycle to infer custody and control of the said drugs on the appellant as the words 'anything whatsoever containing any dangerous drugs' found in s 37(d) does not include a vehicle.

[20] Learned counsel also submitted on the belated defence ie that the first accused should not be made to suffer as a result of negligence of counsel in failing to put the defence at the prosecution stage.

[21] On the issue of misdirection, it was submitted that the learned trial judge had invoked double presumption under s 37(d) and (da) of the Act and that the learned trial judge had failed to analyse, assess and examine as a separate exercise on whether the defence had rebutted the presumption of trafficking under s 37(da).

[22] We find no merit in the grounds canvassed by learned counsel for the first accused. Having perused the grounds of judgment, we find that there was no misdirection by the learned trial judge in finding that the prosecution had proved a prima facie case against the first accused. The learned trial judge had

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considered the elements of custody and control and knowledge of the drugs in finding that the first accused had mens rea possession of the drugs. This is evident from the following paragraphs of the grounds of judgment:

> [45] ... Motorsikal PHA 7105 di mana dadah terlibat dijumpai juga didaftarkan di atas nama tertuduh pertama (P23). Dengan kata lain tertuduh pertama adalah pemilik motorsikal PHA 7105 yang diserbu dan dijumpai dadah di dalam raga motorsikal dan beliau berada bersama motorsikal tersebut ketika itu. Tertuduh menyedari beg yang berada di dalam raga motorsikal itu yang terletak di hadapan beliau. Tertuduh boleh memeriksanya jika mahu dan terdapat peluang untuk memeriksanya.
>
> [46] Di atas keterangan yang ada, mahkamah berpuas hati bahawa pihak pendakwaan telah dapat membuktikan bahawa tertuduh pertama mempunyai kawalan dan jagaan ke atas motorsikal PHA 1705 pada masa serbuan tersebut. Mahkamah berpuas hati dengan keterangan yang ada bahawa tertuduh pertama juga mempunyai kawalan dan jagaan ke atas beg plastik P25 dan kandungannya iaitu dadah terlibat yang berada di dalam raga motorsikal tersebut ...
>
> [47] ...
>
> [48] Dengan keterangan yang ada, mahkamah juga mendapati tertuduh pertama mempunyai pengetahuan (knowledge) ke atas dadah tersebut. Kehadiran beg plastik hijau muda (P25) yang bersaiz lebih tinggi dari saiz ketinggian raga motorsikal dengan mudah boleh dilihat oleh tertuduh pertama ketika menunggang motorsikal PHA 7105 tersebut. Tidak ada apa-apa perkara yang dapat menghalang tertuduh pertama daripada memeriksa kandungan beg tersebut jika beliau mahu berbuat demikian. ... Adalah dapatan affirmative oleh mahkamah ini bahawa tertuduh pertama mempunyai milikan sebenar (actual possession) ke atas dadah tersebut. Dengan yang demikian milikan oleh tertuduh ke atas dadah terlibat adalah suatu milikan mens rea. Memandangkan berat dadah terlibat jauh melebihi daripada peruntukan anggapan minima statutori, peruntukan anggapan pengedaran di bawah seksyen 37(da) Akta Dadah Berbahaya, 1952 adalah terpakai.

[23] From the above, it is clear that the learned trial judge had not invoked double presumption.

[24] Further, we find that the learned trial judge had properly addressed his mind on the duty of the court at the end of the defence case and although the learned trial judge did find that the defence was an afterthought, His Lordship went on to consider the defence as can be seen from paras 69 to 78 of the grounds of judgment.

[25] The learned trial judge had adhered to the principles set out in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Mat v Public Prosecutor* [1963] 1 MLJ 263. In the circumstances, there is no reason for us to disturb the findings of the learned trial judge that the first accused has failed to raise a reasonable doubt on the prosecution's case and has failed to rebut the presumption of trafficking under s 37(da) of the Act.

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[26] Learned counsel for the first accused submitted that the learned trial judge merely paid a lip service to the need to separately analyse whether the first accused had rebutted the presumption when His Lordship stated at para 78 of the grounds of judgment that 'Di atas beban imbangan kebarangkalian, pembelaan tertuduh juga telah gagal menyangkal peruntukan anggapan s 37(da)(vi) Akta Dadah Berbahaya 1952 yang terpakai ...'. In our view, the learned trial judge had not misdirected himself in concluding that the first accused has failed to rebut the presumption of trafficking.

[27] Considering the evidence in totality, we find that the conviction of the first accused is safe. We therefore unanimously dismissed the appeal of the first accused and affirmed the conviction and sentence of the High Court. As for the second accused, we find that there is no merit in the appeal by the prosecution. We affirmed the order of acquittal and discharge of the second accused.

Appeal of first accused dismissed and conviction and sentence of High Court affirmed.

Reported by Afiq Mohamad Noor